

3523(6)(5) and opposing parties (attly. fees as "in the nature of support". *Distinction* → *settled* vs. *actually litigated cases*.
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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA

Brunswick Division

In the matter of:

OKEY DAVID ARMENTROUT
(Chapter 7 Case 90-20323)

Debtor

CAROLYN S. ZISSER

Plaintiff

v.

OKEY DAVID ARMENTROUT

Defendant

Adversary Proceeding

Number 90-2023

FILED

at 11 O'clock & 14 min. A.M

Date 5/24/91

MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia *MB*

MEMORANDUM AND ORDER

FINDINGS OF FACT

Debtor and his former wife Jacqueline D. Armentrout were divorced on July 11, 1988, after protracted litigation and a trial to the Circuit Court of the Fourth

Judicial Circuit in and for Duval County, Florida. The court considered the income and assets of the parties. In its Final Judgment of Dissolution of Marriage, the court awarded the former wife the sum of \$600.00 per month as permanent periodic alimony. The court also ordered that the debtor pay \$3,000.00 of the wife's attorney's fees through Carolyn S. Zisser, the wife's attorney in the divorce proceeding and the Plaintiff herein.

Pursuant to Florida law, the Circuit Court held additional hearings on the issue of attorney's fees on October 31, 1988, and February 21, 1989. In the Order on Wife's Request for Attorney's Fees and Costs dated April 6, 1989, the court upheld the amount of \$3,000.00 for the wife's attorney's fees and costs.

The Debtor then appealed to the First District Court of Appeals (of Florida) which, on July 12, 1989, affirmed the lower court without opinion. As a result of the appeal, the Debtor was ordered to pay an additional \$3,158.28, through Carolyn S. Zisser, as his contribution to attorney fees incurred by the former wife on appeal.

CONCLUSIONS OF LAW

The Plaintiff contends that the obligation to contribute to the former wife's attorney fees is in the nature of alimony and is nondischargeable in bankruptcy. The Defendant argues that the obligation is not in the nature of alimony and is therefore dischargeable.

11 U.S.C. Section 523(a)(5)¹ creates an exception from discharge of any debt "to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child . . . ", but only if the debt is "actually in the nature of alimony, maintenance, or support". There is ample controlling authority in the Eleventh Circuit and the Southern District of Georgia in interpreting and applying 11 U.S.C. Section 523(a)(5).²

The Eleventh Circuit has made it clear that "what constitutes alimony, maintenance, or support will be determined under the bankruptcy laws, not state law." Harrell, 754 F.2d at 905 (quoting H.R.Rep.No. 595, 95th Cong., 1st Sess. 364 (1977) reprinted in 1978 U.S.Code Cong. & Admin. News 5787, 6319). However, the Harrell court

¹ 11 U.S.C. Section 523(a)(5) provides that:

- (a) A discharge . . . does not discharge an individual debtor from any debt--
 - (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that--
 - (A) such debt is assigned to another entity, voluntarily by operation of law, or otherwise . . . ; or
 - (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;

² In re Harrell, 754 F.2d 902 (11th Cir. 1985); Matter of Crist, 632 F.2d 1226 (5th Cir. 1980), cert. denied, 451 U.S. 986 (1981) cert. denied, 454 U.S. 819 (1981); In re Holt, 40 B.R. 1009 (S.D.Ga. 1984) (Bowen J.); In re Bedingfield, 42 B.R. 641 (S.D.Ga. 1983) (Edenfield, J.).

recognized that considerations of comity preclude federal court "assessment of the ongoing financial circumstances of the parties to a marital dispute [which] would of necessity embroil federal courts in domestic relations matters which should properly be reserved to the state courts." 754 F.2d at 907.

Although bankruptcy is not bound by state court denomination of divorce related obligations as alimony or support, 754 F.2d at 904-06, the characterization of the obligation applied in state court is entitled to greater deference where it is based upon findings of fact and conclusions of law stemming from actual litigation of a divorce rather than from judicial approval of an uncontested divorce settlement. In re Hall, 40 B.R. 204, 206 (Bankr. M.D.Fla. 1984).

Other courts have recognized the distinction between cases actually litigated in the state courts and divorce settlement agreements approved by the state courts. As stated by the Sixth Circuit:

We recognize that such inquiry [as to whether in the nature of support or alimony] may, in effect, modify a judgment or decree of a state court Actual interference, however, will probably be minimal. In a contested case the likelihood that the state court would have awarded support where it was unnecessary is sufficiently remote that such interference by the bankruptcy court will seldom be necessary. When . . . the decree is not the result of a contested case but merely incorporates the parties' agreement, the concern for comity is of less importance. To allow the parties' characterization of . . . [debts] in such cases to control pro forma would permit the debtor to agree to forego his rights under the bankruptcy laws.

In re Calhoun, 715 F.2d 1103, 1109-10, n.10 (6th Cir. 1983). And as stated by the Bankruptcy Court for the Western District of Kentucky:

The Calhoun doctrine signals a significant involvement of bankruptcy courts in domestic relations matters heretofore thought to fall within the sole province of the state courts. Any resulting erosion of federalism, however, is more apparent than real and may be easily explained. It is not those questions of support which have been fully litigated and adjudicated in the state court system which are now subject to second-guessing by bankruptcy judges, sitting as 'super-divorce courts'. It is only those cases, Calhoun firmly points out, in which former spouses settle their support differences by agreement (albeit with resulting state court approval), that bankruptcy courts may later reopen and re-examine. In this regard Calhoun balances the federal right to a fresh start against the state interest in judicial efficiency and finds the latter wanting.

In re Helm, 48 B.R. 215, 225-26 (Bankr. W.D.Ky. 1985) (emphasis provided). See also In re Rickman, 79 B.R. 753 (Bankr. W.D.Tenn. 1987) ("A distinction has been made between those domestic cases which are uncontested in the state court and those which are fully litigated."); In re Redin, 57 B.R. 346 (Bankr. S.D.Fla. 1986) (declining to "second-guess" the fully litigated state court determination as a "super-divorce court").

The matter at hand was fully and fairly litigated in the Florida State Court system. The Final Judgment of Dissolution of Marriage is explicitly detailed, thorough and compelling. The need of the non-debtor spouse and the marked disparity of earning ability

between the parties was duly considered by the Court in its decision to award the former wife alimony in the sum of \$600.00 per month until her death or remarriage. The court also noted that "the husband has a considerably greater earning capacity than does the wife, that both parties have relatively meager assets and that a significant portion of the time devoted to this matter by the wife's attorney was the direct result of the husband's actions, which were intended to make him appear impecunious" before awarding attorney fees to the wife in the sum of \$3,000.00. After the Debtor lost on appeal, the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida, after a detailed lodestar analysis, awarded an additional \$3,158.28 as attorney fees for the wife. Florida bankruptcy courts addressing this issue have determined that an award of attorney fees is in the nature of support and therefore nondischargeable. Matter of Heverly, 68 B.R. 21 (Bankr. M.D.Fla. 1986); In re Jackson, 59 B.R. 77 (Bankr. S.D.Fla. 1986); In re Bolt, 52 B.R. 106, (Bankr., S.D.Fla. 1985); In re Romano, 27 B.R. 36 (Bankr. M.D.Fla. 1983). The reasoning in Romano, consistent with the other referenced cases is that an award of attorney fees under the Florida Statutes is based upon the same consideration as an award of alimony, i.e., need and ability to pay. Upon due consideration of the underlying documentation and the testimony adduced at trial, I find that the attorney's fee awards are also in the nature of alimony or support.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS

THE ORDER OF THIS COURT that the Debtor's obligation to his former wife for contribution to attorney fees in the sum of \$6,158.28 is nondischargeable.



**Lamar W. Davis, Jr.
United States Bankruptcy Judge**

Dated at Savannah, Georgia

This 23 day of May, 1991.

United States Bankruptcy Court

For the Southern District of Georgia

In the matter of:

CAROLYN S. ZISSER

Plaintiff

v.

OKEY DAVID ARMENTROUT

Defendant

Adversary Proceeding
Number 90-2023

Chapter 7 Case
Number 90-20323

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Date 5/24/91

MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia *MCB*

J U D G M E N T

This proceeding having come on for trial or hearing before the court, the Honorable Lamar W. Davis, Jr., United States Bankruptcy Judge, presiding, and the issues having been duly tried or heard and a decision having been rendered,

IT IS ORDERED AND ADJUDGED:

That the Debtor's obligation to his former wife, Jacqueline D. Armentrout, for contribution to attorney fees is non-dischargeable.

That Plaintiff, CAROLYN S. ZISSER, recover of the Defendant, OKEY DAVID ARMENTROUT, the principal sum of *Six Thousand One Hundred Fifty-Eight Dollars and Twenty-Eight Cents (\$6,158.28)*, together with interest at the rate of 6.07% from date until paid in full.



[Seal of the U.S. Bankruptcy Court]

Date of issuance: May 24, 1991

MARY C. BECTON

Clerk of Bankruptcy Court

By: Patsy C. Burkhalter

Deputy Clerk